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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 700

F. S. GAMBRELL, ET AL.,

Appellants,

vs.

CHALK HILL THEATRE COMPANY, LTD., ET AL.,

Appellees.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

STATEMENT OF CHALK HILL THEATRE COMPANY, LTD., OPPOSING JURISDICTION ON APPEAL

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APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

STATEMENT OPPOSING JURISDICTION ON APPEAL

Pursuant to the terms of Subsection 3, of Rule 12, of this Court, Chalk Hill Theatre Company, Ltd., an Appellee, respectfully files this statement opposing jurisdiction on appeal.

Opinion Below

The only court to write an opinion in this case was the Court of Civil Appeals for the Third Supreme Judicial District of Texas. Its opinion is reported in 205 S. W. (2d) 126.

Jurisdiction

Appellants claim jurisdiction under Judicial Code, Section 237 (a); 28 U. S. C. A. 344 (a). This Appellee submits, as will appear from the summary of the argument, that no jurisdiction exists because no Federal question is presented by Appellants.

Statement of the Case

Appellants, as the owners of one lot and the holders of a contract of sale covering a second lot in a subdivision described as "Northfield Annex No. 2" in the City of Austin, Travis County, Texas, instituted this action against Appellees, seeking an injunction restraining the closing of *any* street within such subdivision and from interfering with Appellants use thereof. *The recovery of damages was not sought.*

The Appellee, Walter Staehely, originally subdivided the tract here in question on or about August 1, 1940, filing an appropriate plat of such subdivision in the Office of the County Clerk of Travis County, Texas, as required by law,[1] dedicating the streets shown thereon for "public use as streets." Appellant, F. S. Gambrell, purchased a lot in such subdivision on January 22, 1946, and entered into a contract of sale to purchase a second lot therein on February 15, 1946.

Thereafter, on February 28, 1946, Appellee, Walter Staehely, filed for record in the Office of the County Clerk of Travis County, Texas, an instrument seeking to vacate and annul the plat theretofore filed and on the same day the City Council of the City of Austin passed an ordinance vacating and closing all streets within such subdivision.

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[1] Acts 1927, 40th Legislature of the State of Texas, page 342, Chapter 231; Vernon's Annotated Civil Statutes, Article 974a.

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Subsequently and as a part of the same transaction, on March 6, 1946, the subdivider filed a second plat of such subdivision in the manner required by law.[1]

The second plat was identical with the first plat of such subdivision except there was a change in the course or direction of Guadalupe Street and a vacation of a few lots lying to the West of Guadalupe Street, as relocated. No property lines were changed by the second plat with the exception that the lots lying East of and adjacent to Guadalupe Street, as relocated, were made larger. No change whatever was made respecting the lot owned by the Appellant or the lot contracted to be purchased by them either as to property lines or as to description. Neither of the lots owned by Appellants abuts on any street or alley that was closed or in any manner altered by the second plat. No easement in Guadalupe Street was destroyed by the second plat, the easement in Guadalupe Street being only slightly changed insofar as concerns its course or direction.

Appellee, City of Austin, Texas, is a "home rule city," deriving its authority from Section 5, of Article 11, of the Constitution of the State of Texas. As such, its City Council has plenary powers over its streets. Sections 16, 17 and 18, of Article 1175, *Revised Civil Statutes of Texas, 1925.* Section 1, of Article 13, *Charter of the City of Austin, Texas. City of Dallas* v. *Ingram* (Tex. Civ. App.), 284 S. W. 345, writ refused;[2] *Duvall* v. *City of Dallas* (Tex. Civ. App.) 27 S. W. (2d) 1105, writ refused.

The Court of Civil Appeals denied Appellants injunctive relief, the only relief sought, for each severally of the following reasons: (1) Appellants had an adequate legal

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[2] The refusal by the Supreme Court of Texas of an application for writ of error amounts not only to an approval of the judgment of the Court of Civil Appeals, but to an approval of that Court's opinion. *Hamilton* v. *Empire Gas & Fuel Co.*, 134 Tex. 377; 110 S. W. (2d) 561; *Humble Oil & Refining Co.* v. *State* (Tex. Civ. App.) 158 S. W. (2d) 336, writ refused.

remedy, to-wit: An action for damages; (2) There was no taking of Appellants' property under Section 17, of Article 1, of the Constitution of the State of Texas as there was no physical invasion or appropriation thereof; and (3) Acts 1930, 41st Legislature of the State of Texas, 5th Called Session, Page 257, Chapter 84 (Vernon's Annotated Civil Statutes, Article 4646a) prohibited the issuance of an injunction in cases of this character. In brief, under state law, Appellants were not entitled to injunctive relief—the only relief requested.

The sole question presented by this appeal is the claim by Appellants that they are entitled to injunctive relief by reason of the Fourteenth Amendment to the Constitution of the United States.

Summary of the Argument

1. No Federal question is presented by appellants' points I and II because no such questions were raised or decided below.

2. No Federal question is presented by appellants' points I and II because the action of the Courts below is supported by a non-Federal ground adequate to sustain it.

First Point

No Federal question is presented by appellants' points I and II because no such questions were raised or decided below.

Argument

This suit was instituted by Appellants against Appellees for an injunction restraining Appellees from physically closing any of the streets within the subdivision above mentioned or from interfering with Appellants' use thereof. As respects the claim of Federal jurisdiction, Appellants,

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in their pleading in the trial court, alleged only "To close and vacate said streets will be to deprive these Plaintiffs of valuable property rights and thereby constitute a taking of Plaintiff's property without due process of law" and that the filing of the second plat "has cast upon the title to the property owned by Plaintiffs a cloud which in effect is a taking of Plaintiff's property without due process of law."

Appellants, in their pleadings, did not point specifically or with particularity to any provision of the Constitution of the State of Texas nor the Constitution of the United States deemed by them to have been violated. To the contrary, Appellants did not, by their pleading, seek or request the Court to declare Article 4646a, or any provision thereof, nor the denial of an injunctive remedy under the facts alleged by them, invalid as being repugnant to the organic law of the State of Texas or of the United States.

The brief filed on behalf of Appellants in the Court of Civil Appeals contended only that Article 4646a, as construed by the trial court, was in contravention of Article 1, Section 19, Constitution of the State of Texas. No claim of Federal question was asserted.

The motion for rehearing filed on behalf of Appellants in the Court of Civil Appeals reiterates the contention as respects the provisions of the Constitution of the State of Texas, but is entirely silent as to claim of Federal question.

The application for writ of error filed on behalf of Appellants in the Supreme Court of Texas raised the issue of due process only as respects the Constitution of the State of Texas.

To summarize, in neither their pleadings, their brief in the Court of Civil Appeals, their motion for rehearing in such Court, nor in their application for writ of error

to the Supreme Court of Texas did Appellants complain of any Federal right being violated. It was only in their motion for rehearing on petition for writ of error filed in the Supreme Court of Texas, which petition for rehearing was not entertained by the Supreme Court of Texas, that Appellants for the first time made direct and specific reference to their claim under the Fourteenth Amendment.

In its opinion, the Court of Civil Appeals considered Appellants' claim of invalidity as respects the Constitution of the State of Texas. It is clear that such Court decided no Federal question, none being presented to it for decision. It is equally apparent that the Federal question now claimed was never properly presented to the Supreme Court of Texas except upon motion for rehearing and that Court then refused to consider it.

The long established general rule is that an attempt to raise a Federal question after judgment upon a petition for rehearing comes too late unless the Court actually entertains the question and decides it. *Herndon* v. *State of Georgia,* 295 U. S. 441, 443; *McCorquodale* v. *Texas,* 211 U. S. 432; *El Paso & Southwestern Railway Company* v. *Eichel & Weikel,* 226 U. S. 590; *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co,.* 252 U. S. 341, 343,

The mere pleading by Appellants in the trial court that the vacating of such streets constituted a taking of property without due process of law is, of course, insufficient to invoke Federal jurisdiction. It appears well settled that an averment making no reference to the Constitution of the United States and asserting no express right thereunder is solely referable to the state Constitution, which, in this instance, has a due process clause and affords no basis whatever for invoking the jurisdiction of this Court. *Bowe* v. *Scott,* 233 U. S. 658. As this Court has often noted, the failure of Appellants to assert the claim of

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Federal jurisdiction in the State Court is not cured by the allowance of an appeal. *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 343.

To summarize, it is not enough that Appellants could have raised a claim of Federal right; they failed so to do in the manner and time required by the decisions of this Court. This Court is, therefore, without jurisdiction over this appeal. The Judicial Code intended to restrict the obligatory appellate jurisdiction of this Court to a narrow class of cases and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled. *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 651.

Second Point

No Federal question is presented by appellants' points I and II because the action of the Courts below is supported by a non-Federal ground adequate to sustain it.

Argument

Under points I and II, Appellants contend that to deny them injunctive relief on any grounds under the facts here presented is to deprive them of their property without due process of law. While this Appellee believes that its judgment is immune to attack against the claim of Federal jurisdiction at this late date, this Appellee, in order that all phases of the case may be considered, presents the following argument addressed to the broad proposition that no substantial Federal question is presented by Appellants.

The due process and equal protection clauses of the Fourteenth Amendment govern state action or action by an agency of the state; they have no application to the action of private individuals. *Nixon* v. *Condon*, 286 U. S. 73, 83. Hence, as respects this Appellee, no colorable claim may be asserted by reason of such amendment.

If by any stretch of the imagination, Appellants' petition for appeal could be construed to allege that the decisions of the courts of Texas are in conflict as to Appellants' private easement, *vel non*, such petition would raise no Federal question. Appellants have no vested interest in the principle of *stare decisis*. The fact that the courts of Texas may have announced law in their case that is different from the law announced in other cases presents no question under the Fourteenth Amendment. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 681; *Fleming* v. *Fleming*, 264 U. S. 29, 31; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 450.

Despite the contention of Appellants that they have a private easement over all streets in the subdivision and that to deny injunctive relief to protect such private easement is to deny due process of law under the Fourteenth Amendment, this Court has uniformly held that a litigant has no property in the constitutional sense in any particular form of remedy; all that a litigant is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332. It is clearly apparent in this case that the substantial rights, if any, of the Appellants respecting the claim of private easement asserted is adequately preserved by a suit for damages; an effective procedure is not denied to them.

Finally, it is settled by the decisions of this Court that the state courts must ultimately determine the extent, limitations and qualifications of an abutting or non-abutting owner's rights and easements in a street. It was the duty of the state court in this case to ascertain, declare and apply the law of Texas and its determination of that law is conclusive upon this court. *Sauer* v. *City of New York*, 206 U. S. 536.

Conclusion

It is respectfully submitted that no Federal question was raised or decided below and that the decision of the Courts below is amply supported on non-Federal grounds.

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